IN THE

Supreme Court of the United States

October Term, 1964.

No. 22.

ALL STATES FREIGHT, INC., ET AL.,
Appellants,

v.

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, ET AL.,
Appellees.

On Appeal From the United States District Court for the District of Connecticut.

BRIEF FOR APPELLEE-RAILROADS.

EUGENE E. HUNT,
54 Meadow Street,
New Haven, Conn. 06506.
EDWARD A. KAIER,
1138 Transportation Center,
Philadelphia, Pa. 19104,
Counsel for Appellee-Railroads.

MARGARET P. ALLEN,
JOHN A. DAILY,
ALBERT W. LAISY,
Of Counsel for Appellees.

October 1, 1964.

INDEX.

INDEX (Continued).

TABLE OF CASES CITED.

TABLE OF CASES CITED (Continued).

STATUTES CITED.

I.C.C. ANNUAL REPORTS.

MISCELLANEOUS.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1964.

No. 22.

ALL STATES FREIGHT, INC., ET AL.
Appellants,

v.

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT.

BRIEF FOR APPELLEE RAILROADS.

STATUTES INVOLVED.

In addition to the statutes designated by Appellants and the Government, the provisions of § 15(1) of the Interstate Commerce Act, 49 U.S.C. § 15(1) which are pertinent in part, are as follows:

> "That whenever, after full hearing, . . . the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, . . . is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, ..."

STATEMENT.

The New Haven Railroad has been heavily dependent upon that kind of traffic which is usually denominated "Manufactures and Miscellaneous" for the revenues required to operate its line. Over 60% of its total freight revenue is produced by such traffic (R. 166). In the post-war period, however, its traffic of this type has suffered severe declines by reason of the shift of increasing amounts thereof to highway transportation, both private and for-hire. Thus, the Manufactures and Miscellaneous traffic originated by it and delivered to connecting railroads declined from 2,941,557 tons in 1947 to 1,479,902 tons in 1958 (R. 151).

Along with this serious and continuing loss to truck transportation, the New Haven was faced with a new competitive force when, in July 1958, competing railroads established a trailer-on-flatcar (TOFC) service—called Plan III—which itself was induced by the necessity of meeting motor carrier competition (R. 113-4, 127-8), primarily that of unregulated motor carriers, *Eastern Central Motor Carriers Association v. Baltimore & Ohio R. Co.*, 314 I.C.C. 5, 51 (1961). Under this Plan truck-trailers laden with any commodity (with specified exceptions) may be brought to the railroads' loading ramp, then carried on flatcars to destination for delivery there to the consignee at the railroads' unloading ramp. The New Haven had clearance and equipment disabilities which prevented its effective participation in this type of transportation. During the first two months in which the Plan III TOFC rates were in effect via the competing railroads, the New Haven lost to the New York Central the equivalent of 350 to 400 cars of traffic from Boston to St. Louis (R. 115, 130). Moreover, shippers from the Connecticut area began to truck to rail

loading ramps in New York for subsequent TOFC movement to the midwest, and this cost the New Haven another half million pounds of traffic per week (R. 115, 130).

The effort of the New Haven to cope with these several competitive forces had logically to take the form of a reduction in its box car rates. This was dictated both by its disabilities in the rendition of TOFC service and by the important fact that it has a great imbalance in the eastbound-westbound movement of traffic over its lines, with the result that every month it dispatches approximately 150 empty box cars to Chicago and St. Louis with a carrying capacity of 3,000,000 tons on an annual basis (R. 97, 334-6). Accordingly, the New Haven filed with the Commission the rates from specified New England points to Chicago and St. Louis, which are the subject of the order involved in this litigation. The rates were so restricted and delineated as to reflect the transportation characteristics of the traffic in question. This was observed by the court below when it stated that (R. 43-44):

> "It excludes anything that cannot be carried in a boxcar—this is obviously a substantial number of things; it is graduated according to minimum weight per car, denser items thus paying less per hundred pounds as has always been true; it excludes perishables, easily damaged goods, explosives, and other such goods whose cost of handling might be extreme; it applies only to freight westward; and there are other exclusions on basis of cost of shipment and handling."

In addition, stop-off and other transit privileges are not allowed (R. 58), and the rates do not apply on export-import or ex-water traffic (R. 11). This latter provision, not only confines the application of the rates to the movements which are affected by the competition which induces them, but it avoids the expensive port services which are

encountered on export-import traffic, thus again giving weight to the cost-of-service factor.

Although the New Haven's rates were initially suspended by the Commission, the suspension was lifted on July 6, 1959, and the rates then went into effect and have remained in effect to the present time.

No shipper or receiver of freight opposed the rates. No one claimed that he was being discriminated against by the relation of one rate to another, or in any other manner. Shippers did appear in support of the rates (R. 305, 315, 317, 321 and 325). They were opposed only by the New Haven's trucking competitors.

The rates not only covered out-of-pocket costs, but were found by Division 2 of the Commission to "more than cover fully-distributed costs" (R. 101), and the entire Commission made a substantially similar finding (R. 12). This means that the rates covered not only the direct cost of performing the service to which they applied but also overhead costs allocated thereto, return on investment, and a contribution for the passenger and less-than-carload deficits of the railroad (R. 376).

Upon reconsideration, the entire Commission (with three dissents) found the rates to be in violation of the provisions of § 1(6) of the Interstate Commerce Act which provides that railroads shall maintain just and reasonable classifications of property with respect to which rates are or may be made, and to constitute a destructive competitive practice in contravention of the National Transportation Policy, the latter conclusion being said by the Government to be an adjunct of the conclusion that § 1(6) is violated and not a conclusion which can be sustained as an independent basis for disallowing the rates (Government brief, p. 33).

In thus condemning the rates on the ground that they violate Section 1(6), the entire Commission for the first time construed that section as applying to rates other than

class rates, a construction which it had specifically rejected in the past. The lower court disagreed with this construction of the Act.

SUMMARY OF ARGUMENT.

Appellees submit that the court below correctly held that the Commission's interpretation of § 1(6) was erroneous.

History prior and subsequent to the enactment of § 1(6) demonstrates that the reasonable classifications required to be maintained by the railroads were those used in the application of class rates. The purpose of the provision was to prevent the circumvention of the Commission's rate powers by manipulating charges through changes in classifications. Commodity rates are adequately policed by other sections of the Act and cannot be affected by classification changes.

Commodity rates have always been treated as exceptions to the classification and the entire Commission has never held such rates to be subject to § 1(6). Indeed, the Commission has specifically refused to apply § 1(6) to all-commodity rates similar to those herein proposed and has given no reason for reversing this holding of over twenty years' standing. In those instances in which the Commission has found all-commodity rates to be unlawful, it has done so because they violated some provision of the Act other than § 1(6).

There is no support for the Commission's argument that violations of § 1(6) depend on whether or not all-commodity rates are lower than carload commodity rates which would otherwise apply. The cases clearly demonstrate that this fact, first, has no bearing on the § 1(6) issue and, second, is not necessarily a determinative factor as to the lawfulness of the rate itself. To adopt this theory would mean that an all-commodity rate below the individual carload rates would violate classification principles but such violation could be cured simply by reducing the carload rates to the level of the all-commodity rate. Yet no factors bearing on classification would be changed

thereby. This result is patently ridiculous and simply supports the position of the court below, and the admission of the Government, that the lawfulness of the effect of rates has no bearing on § 1(6) issues and should properly be considered under another section of the Act.

Appellees have also addressed themselves to certain other arguments raised herein including the Government's discussion of the relevance of "value of service" under § 1(6). Since the lower court did not rely upon this matter to support its conclusion as to the nonapplicability of § 1(6) to all-commodity rates and since the Commission made no decision with respect to this issue, Appellees submit that the question of value of service as an element in present day rate making should not be decided on this appeal.

Appellees submit that the judgment of the district court should be affirmed.

ARGUMENT.

I.

REPLY TO THE GOVERNMENT'S ARGUMENT THAT § 1(6) OF THE INTERSTATE COMMERCE ACT REQUIRES REASONABLE CLASSIFICATIONS OF FREIGHT IN THE MAKING OF COMMODITY RATES, NO LESS THAN IN THE MAKING OF CLASS RATES.

A. The Court Below Properly Held That the Commission's Interpretation of § 1(6) Was Erroneous.

1. § 1(6) applies only to classifications used for the application of class rates.

The following discussion has as its basis the distinction between "class" and "commodity" rates. "Class" rates are applied to traffic by means of two separate tariffs. One of these, the "classification", assigns every—or virtually every—article of commerce to one of a limited number of classes. The other, the class rate tariff, specifies the particular rate which is applicable to each class in the classification. The class *rates* are established independent of the articles upon which they will apply. Then, as a separate and independent matter, articles are assigned in the *classification* to one or another of the classes, and the class rate previously established becomes applicable to it.

The article or articles upon which commodity rates apply are known from the time the rate is established. The commodity rate is made specifically applicable to a named commodity or group of commodities. After the commodity rate is published nothing further remains to be done to fix the charge for transporting the article or articles to which it applies. With respect to the non-class rate, therefore, the function which is indispensable in applying a

class rate to a given shipment—that of assigning the article being shipped to a class in the classification—does not take place.

Class rates (basically made on mileage scales) have almost nation-wide application.[1] Even though the rates themselves may be reasonable and free of discrimination, one shipping under them may be subjected to a charge which is too high or improperly related to the rate on another commodity by reason of the classification which is assigned to his article. With respect to things shipped under class rates, therefore, there was need for a legal requirement of reasonableness in classification. Therein lies the purpose of § 1(6) and the reason for its enactment.

While § 1(6) is indispensable in connection with articles shipped under class rates, there is no need for it in connection with commodity rates, and as to such rates it would serve no purpose not fulfilled by other sections of the Act. Thus, (a) if a commodity rate is too high it violates § 1(5) of the Act, which prohibits unreasonable rates, and the Commission may reduce it under § 15(1); (b) if a commodity rate unjustly discriminates against a shipper, it violates § 2 of the Act, and the Commission may order the discrimination removed under § 15(1); (c) if a commodity rate causes undue prejudice to a shipper or locality or "to any particular description of traffic" it violates § 3(1) of the Act, and the Commission may require the removal of the undue prejudice under § 15(1); (d) if the commodity rate is unduly low it violates § 1 as supplemented by § 15a(2) (subject to § 15a(3) when challenged by a competing mode of transportation) and the provision of the National Transportation Policy against unfair competitive practices. As the court below properly held, commodity rates are "sufficiently policed" under these sections (R. 44).

---

1. *Class Rate Investigation*, 1939, 262 I.C.C. 447 (1945), affirmed, *New York v. United States*, 331 U.S. 284 (1947).

(a) That § 1(6) Applies Only to Classifications Used in Applying Class Rates Is Demonstrated by History Prior to the Enactment of § 1(6).

At the time of the adoption of the Interstate Commerce Act virtually all traffic moved on class rates. However, not only each section of the country, but, in many cases, individual railroads, maintained different classifications and different sets of rates applicable thereto. Shippers could not tell in advance the cost of a particular movement because of these differences and the system led to the charging of excessive rates and to widespread discrimination between shippers and commodities.[2]

This situation was given particular attention by the Cullom Committee,[3] which was primarily responsible for the drafting of the Interstate Commerce Act. After noting the urging by shippers of the need for uniformity in classifications, the Committee considered giving the proposed Commission the power to prescribe classifications.[4] It concluded that the provisions of the proposed bill requiring publication of rates and classifications coupled with the provisions regulating unreasonable rates would secure the desired uniformity without requiring it specifically.[5]

Starting with its First Annual Report[6] the Interstate Commerce Commission became concerned with classifications and reiterated the need for uniformity. In 1891 it

---

2. See *Investigation and Suspension Docket 76*, 25 I.C.C. 442, 454-5 (1912).

3. Senate Select Committee on Interstate Commerce, appointed March 21, 1885.

4. S. Rep. No. 46, 49th Cong., 1st Sess. 188 (1886).

5. *Ibid.* The Interstate Commerce Act, as originally passed, did in fact contain a requirement that rates and classifications be made public. 24 Stat. 380 (1887), 49 U.S.C. § 6 (1958).

6. First ICC Ann. Rep. 30-32 (1887). In fact, in 1888 the House of Representatives adopted a resolution directing the Commission to prescribe a uniform classification for the railroads, but it died as a result of Senate inaction. See *Investigation And Suspension Docket 76*, 25 I.C.C. 442, 455 (1912).

recommended that Congress require the adoption by the railroads of a uniform classification.[7] By 1894 the Commission recommended that it be empowered to make a uniform classification, subject to amendment from time to time, and that penalties be provided for non-conformance.[8]

At the same time that it was urging uniformity of classifications, the Interstate Commerce Commission was exercising power over classifications in proceedings involving §§ 1, 2 and 3 of the Act, and in many cases declared classifications of particular articles to be unreasonable.[9] In determining the reasonableness of classifications the Commission generally considered factors relating to bulk or weight, ease of handling, susceptibility to loss and damage, territorial interests, cost of service, etc., with value of service, in the sense of a more valuable article being able to bear a larger proportion of the transportation burden, being the element of primary importance.[10] However, enforcement of Commission decisions was a major problem since it had no specific power to prescribe either reasonable classifications or reasonable rates for the future. As to rates, the problem was solved by the Hepburn Act[11] in 1906 under which the power to prescribe maximum reasonable rates was expressly conferred on the Commission. This in itself proved to be inadequate because changes in transportation charges could be effected by changes in classifications as well as changes in rates.

---

7. Fifth ICC Ann. Rep. 33 (1891).

8. Eighth ICC Ann. Rep. 38-39 (1894).

9. See, *e.g.*, *National Hay Association v. L.S. & M.S.R. Co.*, 9 I.C.C. 264 (1902); *Thurber v. N.Y.C. & H.R.R. Co.*, 3 I.C.C. 473 (1890); *James Pyle & Sons v. East Tennessee, Virginia & Georgia R.R. Co.*, 1 I.C.C. 465 (1888).

10. *E.g.*, *Meyer v. Cleveland, C., C. & St. L. Ry. Co.*, 9 I.C.C. 78 (1901); *Thurber v. N.Y.C. & H.R.R. Co.*, *supra* note 9; *Myers v. Pennsylvania Co.*, 3 I.C.C. 130 (1889). In addition see Second ICC Ann. Rep. 35 (1888); First ICC Ann. Rep. 31, 36 (1887).

11. 34 Stat. 589 (1906), 49 U.S.C. § 15(1) (1958).

This loophole was corrected by the passage of the Mann-Elkins Act in 1910.[12] This amended the Act to provide in § 1(6) that carriers must establish and maintain reasonable classifications of freight with reference to which rates are or may be made and in §§ 15(1) and (7) the Commission was given the power to find classifications unreasonable and prescribe reasonable classifications in place thereof. That these provisions were enacted to insure the reasonableness of classifications used in connection with class rates is clear from the legislative history. Thus in a report on the Senate Bill (S. 6737) it was stated that:

> "Some doubt has been raised as to whether, under the provisions of Section 15 of the existing act, the commission is empowered to review CLASSIFICATION of freight as well as rates, and to make orders dealing with improper classifications. (Judson on Interstate Commerce Ed. of 1908, Sections 209, 210.) By Section 9 of the bill, this doubt is removed and the power is expressly vested in the commission." [13]

And in a special message to Congress President Taft recommended:

> ". . . that the Commission shall be fully empowered, beyond any question, to pass upon the classifications of commodities for purposes of fixing rates, in like manner as it may now do with respect to the maximum rate applicable to any transportation." [14]

Similarly, in the debates on the proposed Bill in the House, Mr. Russell, a member of the Committee on Interstate and Foreign Commerce said:

---

12. 36 Stat. 544, 551, 552 (1910), 49 U.S.C. §§ 1(6), 15(1), 15(7) (1958).

13. S. Rep. No. 355, 61st Cong., 2d Sess. 4 (1910).

14. H. Rep. No. 923, 61st Cong., 2d Sess. 9 (1910).

> ". . . I am not familiar with railway practices or rate sheets, or things of that kind, but I was told by a member of this House who has familiarity with them, a few days ago, that the shipper can be extorted from; he can be made to pay an unjust rate just as well through classification as he can through the fixing of a rate. The carriers can put an article in one classification, subject to a given rate, and if the I.C.C. sees fit to declare that rate unreasonable, and reduce it, declaring what shall be a reasonable rate to take its place, the carrying corporation can obtain the same benefit and put the shipper under the same disadvantage by simply changing the classification of the articles."[15]

And Mr. Mann, Chairman of that Committee, stated, *inter alia,* that "classification of freight is just as important as rates, because by moving a particular article from one class to another you affect the rates."[16] Again, after referring to the Official, Western and Southern Classifications, and ones of lesser importance, Mr. Mann concluded:

> ". . . However, in the course of time undoubtedly the power of the commission to have control of classifications will lead to greater uniformity and possibly to complete uniformity of classifications . . ."[17]

Clearly what Congress had in mind was the established class rate classifications in the several regions, the ability of the carriers to use these to charge discriminatory and excessive rates and the thought that, as urged by the Commission, uniformity in these classification tariffs could be encouraged.

The government has contended (Brief pp. 13-14) that the Commission had applied classification principles to

15. 45 Cong. Rec. 5142 (1910).
16. 45 Cong. Rec. 4578 (1910).
17. *Ibid.*

commodity rates prior to 1910 and, therefore, the enactment of the Mann-Elkins Act simply approved this practice and intended that § 1(6) apply to commodity as well as class rates.

Upon analysis, this argument is not supported by the authorities cited. For the most part, commodity rate cases were brought under § 2 or § 3 of the Act prohibiting discriminations resulting from different charges for transporting a *like kind* of traffic under similar circumstances or preferring a particular description of traffic or person to the prejudice of another. In *Coxe Brothers & Co. v. Lehigh Valley R. R. Co.*[18] the Commission was asked to find that anthracite and bituminous coal were like kinds of traffic; in *Bates v. The Pennsylvania Railroad Co., et al.*[19] the removal of corn from the classification and the application of a commodity rate thereto was found to be a discrimination against a like kind of traffic. Similarly, discrimination was found in *Stowe-Fuller Company v. Pennsylvania Co.*,[20] where the Commission refused to allow three types of brick to take different rates. It is true that in these cases the Commission, in determining whether there was in fact a *like kind of traffic*, referred to classification or grouping in comparing the commodities. However, whether articles constitute a *like kind* of traffic depends necessarily on many of the same considerations that go into the making of a classification and it appears that the Commission was here using "classification" simply to denote its comparing of articles for the purposes noted above. In fact, the Commission in *N.Y. Bd. of Trade v. P.R.R. Co.*, 4 I.C.C. 447 (1891), pointed out that the considerations applicable to questions of like kind of traffic are indeed similar to those involved in questions of classification (p. 514). It is clear, therefore, that the Government's contention that the Mann-Elkins Act approved the Commission's prior application of

18. 4 I.C.C. 535 (1891).
19. 3 I.C.C. 435 (1890).
20. 12 I.C.C. 215 (1907).

classification principles to commodity rates and intended that § 1(6) should apply to commodity as well as class rates cannot be sustained. On the contrary, noting that commodity rates (and class *rates*, but not classifications applicable thereto) could be controlled under §§ 1, 2 and 3 of the Act, the more likely inference is that Congress gave its attention to the matter of controlling class rates by controlling the classifications to which they applied. That was the problem. Moreover, that is what the Congressional history shows to have been done.

(b) Developments Subsequent to the Enactment of § 1(6) Confirm the View That § 1(6) Does Not Apply to Commodity Rates.

This conclusion is borne out by *Rates on Lumber & Lumber Products*, 52 ICC 598 (1919), the very case which the Government cites for the opposite proposition. Notwithstanding the language quoted in the Government's Brief (pp. 14-16), the Commission made it clear at the beginning that the case involved *rate relationships* and the determination of reasonable and nondiscriminatory *rate relationships*. And in answer to an argument about its classification power the Commission pointed out that prior to the 1910 amendment of §§ 1 and 15 it had the power to determine rate relationships of different articles and to effect reasonable rates to avoid undue prejudices against a particular description of traffic.[21] This was the object sought therein. It went on to say that whether the means through which this is attained is referred to as a lumber list, a classification, a rate schedule or a combination of all these means little since §§ 1, 3 and 15 empowered it to effect a rate relationship. Thus the Commission made clear that this was not a classification case, and was not undertaken under § 1(6), but under the powers it had prior

21. 52 I.C.C. at 602, 603.

to the enactment of that provision and that it was concerned with *rate* relationships.

In *U.S. Leather Co. v. Southern Ry. Co.*[22] the Commission pointed out that the theory that the fixed relationships between commodities must be the same in all cases and that the classification determines those relationships would mean that commodity rates could never be justified. In *Advances in Rates—Eastern Case,*[23] the Commission referred to commodity tariffs as exceptions to the classified list and in *R.R. Commn. of Nevada v. Southern Pacific Co.*[24] the Commission explained that it could fix a low scale of class rates with no commodity rates in order to move certain traffic or it could fix a high level of class rates and take from the classification a number of articles taking commodity rates, pointing out that the latter was known to be the manner used by the carriers through the years to adapt their rates to the movement of traffic.[25]

Indeed, in its first extensive exercise of its new power to suspend classifications,[26] the Commission stated that "at the present time the three great classifications, Official, Western and Southern, subject to exceptions' sheets and commodity rates, . . . are the only classifications applying to interstate traffic." This makes it clear that classifications have been looked upon by the Commission as those applicable to class rates.

Finally, in reference to the *Class Rate Investigation, supra,* the Commission pointed out that it was examining the class rates and in *Consolidated Freight Classification,* a related proceeding,[27] the underlying classifications. It

22. 21 I.C.C. 323 (1911).

23. 20 I.C.C. 243 (1911).

24. 21 I.C.C. 309 (1911).

25. *Id.* at 232.

26. *Investigation and Suspension Docket No. 76,* 25 I.C.C. 442 (1912), (known as the "Western Classification Case").

27. Both of these proceedings are reported together in 262 I.C.C. 447 (1945), aff'd *New York v. United States,* 331 U.S. 284 (1947). They point up the fact that rates and classifications are entirely sepa-

pointed to widespread departures by way of commodity rates in derogation of the principles of classification (p. 476). It did not conclude that the reasonable classification provision of § 1(6) applied also to these. The extensive use of such rates simply supported the conclusion that existing classifications were outmoded and obsolete and required modification. The conclusion of that case and the requirement that a uniform classification be established was called the culmination of the many efforts to get uniformity.[28] A uniform classification is the classification that the Commission has always sought and it is indeed the classification of freight that satisfies the requirement of

---

rate matters which rest on separate principles. This was recognized in the *Western Classification Case*, note 26, *supra*, in which the Commission said at p. 453:

> "Classification is an art or a science in itself. Having completed a new classification along these or similar lines, each carrier can readjust its rates on the basis of that classification in such a manner as to preserve its existing revenues. This assumes what, in our judgment, is the correct method of procedure, that the uniform classification must be worked out without an attempt to affect revenues. Classification and rates and revenues should be kept entirely separate. There will doubtless be many coincidences in which the present rate applied to the new classification will bring about the exact transportation charge which results from the old rate applied to the old classification. In other cases the rate must be advanced or reduced, depending upon the change in the classification of the article in order to protect existing revenues. This is entirely without reference to the sufficiency or insufficiency of present revenues, which is a distinct and very different question. It would only complicate and confuse matters to attempt, through the instrumentality of the classification, to bring about a revision in rates and charges. Whether a rate is too high or too low should be made a separate issue distinct from classification. Nevertheless, as far as possible, the establishment of ratings and the publication of rates should follow changes in the classification very closely. A *classification is a universal tariff from which the schedules of individual carriers should not depart, except in cases demanded by special conditions.* Commodity tariffs in restricted numbers will probably always remain a necessity." [Emphasis supplied.]

28. Sixty-Sixth I.C.C. Ann. Rep. 58 (1952).

§ 1(6) for just and reasonable classifications of property with reference to which rates are or may be made.[29]

Thus it seems clear that classifications, as envisaged not only since the enactment of § 1(6) but, indeed, since the passage of the Act, are those used in connection with the application of class rates and that Congress was aware of this in passing the amendment of 1910.

2. The Commission has consistently refused to apply Section 1(6) to commodity rates.

The entire Commission has never held that commodity rates violate § 1(6) of the Act. A careful reading of the cases cited by the Government (Brief p. 16) shows that the issues therein arose and were decided under §§ 1(5), 2 and 3 of the Act, relating to reasonable rates, discrimination and undue prejudice and that references to classification related to the comparisons of commodities for the purpose of determining their likeness and the relationship of rates in the application of the latter provisions.[30] In all the decisions of the Commission since 1910, one will search in vain for a decision of the full Commission applying § 1(6) to commodity rates, although there are many determining their lawfulness under §§ 1(5), 2, 3 and 15, including the relationship of commodity rates in *Rates on Lumber and Lumber Products, supra*. The reason, of course, is clear. These sections amply protect the shipper, locality, other descriptions of

29. Apparently the Commission agrees because, as the Government noted on p. 4 of its Brief, the hearing examiner found that the proposed rates tended to undermine the "uniform freight classification in violation of section 1(6)" of the Act (R. 84).

30. *Transit of Furfural Residue at Various Points*, 322 I.C.C. 794 (1964), decided by Division 2 after the decision of the district court in the instant proceeding, held that a proposal to establish increased commodity rates on furfural, further processed than screened, while retaining existing rates on furfural, not further processed than screened, violated §§ 3(1) and 1(6). It appears that this decision is simply erroneous and is not supported by the authorities cited therein.

traffic or other rates from preference, prejudice and unreasonableness as to commodity rates. Since a commodity rate is applicable to a single commodity or group of commodities under a rate tariff and does not depend on a classification to determine its application, the provision of § 1(6) has been deemed to have no application to such a rate. Subjecting commodity rates to the requirements of § 1(6) would simply add an additional and needless burden to the process of justifying a rate. Moreover, it is difficult to see how a commodity rate not in violation of the Act as discriminatory, preferential, unreasonably high or low or unreasonably related to other *rates* could violate § 1(6) alone because, by its nature, it is an exception to the classification which was constructed on classification principles.

It is interesting that the Commission (R. 13) and the Government in this proceeding (Brief p. 16) state that all-commodity rates were introduced in the early 1930's; indeed the Commission pointed out in 1940 that such rates had for many years been used on export and import traffic.[31] Yet there is no case in the early 1930's or before questioning the propriety of such rates under § 1(6) of the Act. Rather, in those cases in which certain proposed all-commodity rates were eventually condemned, the unlawfulness resulted from the violation of some section of the Act other than § 1(6).

It was not until Commissioner Alldredge in several opinions raised the issue of § 1(6) that it was squarely presented to tne Commission and soundly rejected in *All Freight to Pacific Coast*, 248 I.C.C. 73 (1941), aff'd, *Pacific Inland Tariff Bureau v. United States*, 50 F. Supp. 376 (W.D. Wash. 1943).[32] The all-commodity rates there involved were applicable on straight as well as mixed

31. *All Freight to Pacific Coast*, 238 I.C.C. 327, 328 (1940).

32. The Commission's decision was upheld over a specific challenge that it had misconstrued its powers under § 1(6), 50 F. Supp. at 377.

carloads as are the rates under consideration in this proceeding. It was urged that the rates violated § 1(6) and the basis of that position is probably best summed up in the dissenting opinion of Commissioner Alldredge who was the chief exponent of the philosophy expounded. Thus, he argued that (p. 101):

> ". . . The significance of classification should be considered in its broadest sense, that is, as furnishing a comprehensive system for the distribution of the general rate burden and the establishment of rate relations, and, so regarded, it necessarily embraces commodity rates as well as so-called class rates . . ."

The majority of the Commission answered by stating that (p. 86):

> ". . . Respondents now maintain a full line of class rates governed by the western classification from and to all of the points involved in this proceeding, as required by section 1(6) of the Interstate Commerce Act. They also maintain hundreds of lower rates as exceptions to the classification, including commodity rates, that are not subject to the classification ratings nor to rules as to mixing of commodities in carloads. Some of the rates apply on broad mixtures of articles differently rated. For example, the brass, bronze, and copper list includes 115 different articles; drugs, medicines, and chemicals, 177; and machines and machinery, over 1,200. There are other lists, but these are representative."

and continued (pp. 87-88) by stating that:

> "Class rates normally reflect the maximum of reasonableness on goods falling within the various classes of traffic. Commodity rates are established, and necessary or desirable exceptions to the classification are made, when circumstances and conditions suggest that

the class basis is too high for application on the traffic. *We have approved this basis of rate making, and have never required commodity rates to conform to the ratings of the classification.* We have long recognized that most of the freight for the Pacific coast moves on commodity rates.

"The public is primarily interested in the charge for the service, irrespective of whether a rate is stated as a class or commodity rate. All rates are required to be just and reasonable, nondiscriminatory and nonprejudicial. *To require carriers to maintain rates only on a classification basis* would make section 1(6) paramount to all other sections of the act, particularly section 1(5), which requires all rates to be just and reasonable, and in this case the result would be rates that are unreasonable under the circumstances and conditions surrounding the traffic." [Italics supplied.]

In Commissioner Eastman's concurring opinion, he stated, at p. 88:

"As is well known, the classifications of freight which the railroads publish are for the purpose of governing the application of their class rates. The latter are used when no rate has been published applying specifically to the movement in question, such specific rates being called commodity rates. The railroads carry, of course, a vast multitude of separate and distinct commodities, and the class rates are a convenient device for avoiding the publication of a like multitude of separate and distinct rates. . . ."

He then went on to state that classification principles have taken into account not only cost of service, but also differences in commodity values and that this consideration of commodity values led to rates on many commodities considerably higher than cost of service would have

justified. He concluded that this fact "nourished the competition which the railroads have encountered as motor transportation has developed. . . ." (p. 89).

In his dissent in the present case, Commissioner Webb stated, with regard to this (R. 21-22):

> "What Commissioner Eastman regards as elementary when the winds of competition were rising is even more elementary today when those winds have reached hurricane force. The legislative and historical background of section 1(6) leaves no doubt that the requirement of classification was intended to reinforce the Commission's power to establish maximum reasonable rates but not to prohibit or restrain competitively compelled departures from the classification."

Commissioner Webb also stated at R. 21:

> "The majority's conclusion that all rates are governed by the classification requirement of section 1(6) is contrary to the fundamental principles of ratemaking which this Commission has recognized during the last twenty years."

The entire Commission again held that all-commodity rates did not violate § 1(6) in *All Freight Rates to Points in Southern Territory*, 253 I.C.C. 623 (1942). In fact, when the development of these Commission decisions on the § 1(6) issue is seen in proper perspective, it is apparent that the opposing view, which was resurrected by the Commission in the instant proceeding, might well be called the "Alldredge Doctrine" since it simply expresses the philosophy, articulated over a period of years, of one Commissioner.

It was Commissioner Alldredge, dissenting in *All Freight Between Harlem River, N.Y. and Boston*, 234 I.C.C. 673, 676 (1939), who argued that the reduction in all-commodity rates, approved by the other two members

of Division 3, violated § 1(6) and that the rates must not only provide revenue but must function fairly and effectively in the general rate structure. Another § 1(6) dissent by this Commissioner appears in *All Freight From Chicago and St. Louis to Santa Rosa, N. Mex.*, 243 I.C.C. 517, 520 (1941), a case in which the other members of Division 2 approved a proposed all-commodity rate.

In *All Freight Between Los Angeles and Albuquerque*, 28 M.C.C. 161, 167 (1941) the classification argument was urged in the protest filed against a proposed all freight commodity rate. The rate was approved by Division 3 with Commissioner Alldredge dissenting on the classification point and relying on *Rates on Lumber and Lumber Products*, 52 I.C.C. 598 (1919) as does the Government in the proceeding here under review (Government Brief, pp. 15-16).

Commissioner Johnson was the only Commissioner ever to join the Alldredge cause. In two decisions by Commissioners Alldredge and Johnson, constituting a majority of Division 3, all-commodity rates were held unlawful, as violations of § 1(6) and § 216(b), respectively, with 52 I.C.C. 598 (1919) used as authority. In the first of these, *All Freight From Eastern Ports to the South*, 245 I.C.C. 207 (1941) Commissioner Mahaffie concurred in the result, seeing a possible violation only under § 15a. In the second, *All Freight From Chicago and St. Louis to El Paso, Tex.*, 28 M.C.C. 727 (1941), Commissioner Aitchison concurred only in the result.

The four cases referred to immediately above were decided between February and May of 1941. Thus when the entire Commission considered the *All Freight to Pacific Coast* case in October of that year, it was well aware of the Alldredge doctrine and the grounds upon which it rested. That doctrine was rejected by the Commission with Commissioners Alldredge and Johnson dissenting on the classification issue, 248 I.C.C. 73, 99, 106 (1941).

The following year *All Freight From Eastern Ports to the South, supra,* was reconsidered by the entire Commission, 251 I.C.C. 361 (1942) and the unlawfulness of the rates was upheld, but the § 1(6) issue was specifically not passed upon. Commissioners Alldredge and Johnson did not dissent.

In *All Freight From Butte, Mont. to Spokane, Wash.*, 251 I.C.C. 291 (1942), Division 2 held that proposed all freight rates did not violate the classification principle. Commissioner Alldredge dissented without opinion, presumably on this issue. In the other major decision of the entire Commission on this question, *All Freight Rates to Points in Southern Territory,* 253 I.C.C. 623 (1942), holding that proposed all-commodity rates did not violate § 1(6), Commissioners Alldredge and Johnson filed separate dissents. Later, Division 2 held rates on buckwheat unreasonable to the extent that they exceeded rates on other grain products. Commissioner Alldredge, in a concurring opinion, stated that the real issue was the grouping of commodities which should not be disrupted except for clear and compelling reasons, citing § 1(6). *Bunge Corp. v. Ann Arbor R. Co.*, 283 I.C.C. 617, 626 (1951). This apparently marked the end of Commissioner Alldredge's campaign. Toward the end of his tenure on the Commission, he served with Commissioners Arpaia and Freas on Division 2. In *Eastern Central Motor Carriers Association, Inc. v. Akron, Canton & Youngstown R. Co.*, 293 I.C.C. 295 (1954) that Division, faced with a § 1(6) argument against the lawfulness of proposed all-commodity rates, stated that after the lapse of time since the *Pacific Coast* and *Southern Territory* cases, it would not be appropriate in a case of limited scope to reverse the holding of the entire Commission with respect to the classification issue. Thus, Commissioner Alldredge not only did not dissent, but apparently acquiesced in this upholding of the Commission's decisions of long standing.

The Commission in the instant case has reversed this long-standing position and espoused the "Alldredge doctrine" which had long before been abandoned by its author. That this position cannot be justified would seem to be clear since it has been demonstrated that, on the basis of the purpose of § 1(6), the need for its provisions and the interpretation given to it by the Commission over the years, the provision thereof requiring "reasonable classifications" has no application to commodity rates.

It is also clear from the Commission's decision in this case that had reduced rates on each of the commodities included in the New Haven's tariff been published in individual tariffs on the same level as that involved here, the Commission would have found no difficulty in approving them. Indeed, this fact was admitted in the brief filed on behalf of the Commission and the Government in the Court below.[33] The obvious effect of this admission is that if the New Haven had assessed the same number of dollars and cents for the transportation involved, and did so by printing a separate rate for each article, then the rates would have been properly related to each other—there would have been no classification problem—and they would

33. Thus, at page 39 of the Government-I.C.C. brief, it was stated:

> "Had they published their rates as carload rates on specific commodities (which is what they are here suggesting), they would have continued to maintain effective straight carload rates, rather than the mere paper rates which now result, and the conflict between the all-commodity rates at issue and the individual carload commodity rates, which now exists, would have been averted. However, it is precisely because the New Haven chose not to publish its rate reductions in individual tariff items but sought unilaterally to sweep away every established carload rate in one publication of unprecedented all-commodity rates that the Commission ordered their cancellation."

Again (page 40 of the Government-I.C.C. brief below):

> ". . . the Commission virtually invited them to refile their rates in individual tariff items, although the carload class and individual commodity rates, as thus reduced, assuredly would disrupt the existing pattern of rates."

not represent a destructive competitive practice even though they "assuredly would disrupt the existing pattern of rates".

In the light of the foregoing, it is especially difficult to find any substance to the Commission's application of § 1(6) to the rates here involved. That the publication of the same rates as individual commodity rates would have been acceptable does show, however, that the requirement of reasonable classification has no application to commodity rates and that its application should be confined to the situation which gave rise to it, namely, to insure proper classification for use in applying class rates.

3. Neither the Commission's Report nor the Government's Brief properly distinguishes the cases in which the Commission has approved all-commodity rates without finding that they violated § 1(6) of the Act.

The Commission's report attempts to distinguish the *Pacific Coast* case by saying that the rates therein considered were no lower than the carload commodity rates which would have otherwise applied (R. 14). It is true that the Commission said (248 I.C.C. at p. 87) that the all-commodity rates on the freight that would move under them were no lower than those on straight carloads, but this observation was not in any way related to the Commission's conclusion that § 1(6) had no application to the all-commodity rates. It was made, rather, to distinguish two other cases in which conclusions of undue prejudice had been found with respect to the rates considered. Indeed, the requirement for reasonable classification under § 1(6) was not so much as mentioned in those cases.

The two cases cited by the Commission at R. 14 simply required the rates to be restricted to mixtures under the particular circumstances involved in each.

The Government, in its brief (p. 17), also states that in certain cases the Commission has restricted the application of all-commodity rates to mixed shipments. Actually, most of the cases there cited simply found the proposed rates to be unreasonably low and one [34] held the rates to be reasonable because they covered costs and were competitively necessary. The point is, however, that each case was decided on its facts and the lawfulness of the level of the proposed rates was considered. None of these decisions referred to § 1(6) or its counterpart § 216(b).

On page 18 of its brief, the Government refers to cases in which the Commission condemned all-commodity rates which undercut class and carload commodity rates. In one of the cases cited, *All Freight Rates to Points in Southern Territory*, 253 I.C.C. 623 (1942), the Commission was so unconcerned about the matter of all-commodity rates being lower than individual carload commodity rates that it said (p. 633) that such individual carload rates "should be reduced so as not [to] exceed the all-commodity rates, if it is intended to apply the latter as maxima." Thus, the matter which is now said to be so vital was left completely to the discretion of the railroads involved. Moreover, if a carrier should reduce its individual carload rates so that they do not exceed an all-commodity rate it would, under this reasoning, automatically achieve a proper relationship between all of the articles involved—a reasonable classification. The superficiality of the distinction urged by the Government is apparent.

The foregoing cases and statements and similar ones propounded by Appellants at pp. 21 and 23 of their brief, simply support the proposition that in various cases, each decided on its own particular circumstances, the Commission has found all-commodity rates to be either unreasonable or reasonable. The fact remains that these interesting observations about rates are not pertinent to the ap-

34. *Freight, All Kinds, From Toledo, Ohio, To Chicago, Ill.*, 302 I.C.C. 751 (1958).

plication of § 1(6) to commodity or all-commodity rates. They do not lend support to the Commission's holding that the rates in question violated § 1(6). And while the Commission was approving or disapproving all-commodity rates for the reasons mentioned above it kept right on stating that § 1(6) was not violated.[35]

In connection with the Government's contention that an all-commodity rate which is lower than the carload rates on some of the individual commodities subject thereto ignores classification principles and, indeed, in relation to its argument in general, that commodity rates must conform to the reasonable classification requirement of § 1(6) it should be noted that individual commodity rates themselves ignore classification standards. "We . . . have never required commodity rates to conform to the ratings provided in the classification" (*All Freight From Butte, Mont., to Spokane, Wash.*, 251 I.C.C. at 296). When they are published, being lower than the classification basis of rates, the traffic actually moves on them. As to such traffic, the classification basis, therefore, becomes in the Government's words, a basis of "paper rates". About 1% of all rail carload tonnage moves on class rates in the Eastern United States.[36] It is patently absurd, therefore, to say that an all-commodity rate makes a class rate a paper rate which would not satisfy the requirement that the carrier maintain a just and reasonable classification of freight. The classification, in combination with the class rates, still performs the function of setting a maximum reasonable basis of rates. And, as to that traffic which moves on the class rates, it is still of just as vital importance that the property be given a reasonable classification as it is that the class rate which is applied thereto shall be

35. *E.g., Eastern Central Motor Carriers Association, Inc. v. Akron, C. & Y. R. Co.*, 293 I.C.C. 295 (1954); *All Freight Rates To Points In Southern Territory*, 253 I.C.C. 623 (1942); *All Freight From Butte, Mont., To Spokane, Wash.*, 251 I.C.C. 291 (1942).

36. *Eastern Central Motor Carriers Assn. v. The Baltimore & O.R.R.*, 314 I.C.C. *supra*, at 17.

reasonable. Here, as previously urged, is the true and necessary reason for an application of the reasonable classification requirement of § 1(6).

The Government's apparent contention that classification is reasonable or unreasonable, depending upon whether or not individual carload rates are lower or higher than all-commodity rates can have no rational basis. If, for example, there is an all-commodity rate of 80¢ per 100 pounds applying on specified articles in straight or mixed carloads, and if each of the articles may move by a competitive agency at a rate of 80¢ but the railroad has an individual carload rate of $1.00 on one of the articles then, under the Government's argument, there is an unreasonable classification in the all-commodity rate. If the individual carload rate should be reduced from $1.00 to 80¢, there would no longer be an unreasonable relationship between the various commodities and no offense to classification principles. Yet none of the facts with respect to the characteristics of the several articles have changed. If traffic is freely moving by railroad on the individual rate of $1.00, the fact that that rate is higher than the all-commodity rate might possibly indicate that the latter is too low as applied to the individual commodity involved. If it were to be investigated by the Commission, traditional grounds of condemnation are available—just as in the case involving a reduction in a rate which applied to that article only. But to condemn the reduced all-commodity rate on the ground of unreasonable classification because lower than an individual rate is simply to say that the all-commodity rate represents a rate reduction and is, therefore, unlawful. The Commission's reasoning and the Government's position in this case would permit a high-cost carrier to say to a low-cost carrier which considers that competitive conditions require all-commodity rates on straight or mixed carloads, "On some of these articles your rates are lower than the individual carload rates and, therefore, are in violation of

§ 1(6)" and upon that theory have the rates found unlawful. There would be no need to show that they are not compensatory, and there would be no need to show that the Complainant is the low-cost carrier. Such a result should no more be permitted when an all-commodity rate is involved than when an individual commodity rate is involved. To sanction the construction of § 1(6) which is urged by the Government in this case would be to seriously jeopardize the 1958 amendments, which are now § 15a(3) of the Interstate Commerce Act, and this Court's decision in *I.C.C. v. New York, New Haven & Hartford R. Co.*, 372 U.S. 744 (1963).

Referring again to the Commission's report, perhaps the most startling conclusion is that exceptions rates and commodity rates are not departures from classifications, rather they are a "necessary and established part" of the rate structure and, therefore, a "reasonable separate category of classification".[37] In view of the long and unwavering line of cases referring to commodity and exceptions rates as exceptions from classification,[38] this statement comes without benefit of authority. Moreover, the very name "exceptions rates" should tell us something. Having thus arbitrarily placed commodity rates within the realm of classification, the Commission promptly makes it clear that just and reasonable classifications of commodity rates bear little if any resemblance to orthodox classifications, because they are based on entirely different considerations.[39] This "clarification" comes just after the Commission has said, first, that all-commodity rates are closely akin to commodity rates and, next, that they here violate § 1(6) be-

37. R. 15.

38. *E.g., Eastern Central Motor Carriers Association v. Baltimore & Ohio R. Co.*, 314 I.C.C. 5 (1961); *Class Rate Investigation, 1939*, 262 I.C.C. 447 (1945); *All Freight to Pacific Coast*, 248 I.C.C. 73 (1941); *Railroad Commission of Nevada v. Southern Pacific Co.*, 21 I.C.C. 329 (1911); *Advances In Rates—Eastern Case*, 20 I.C.C. 243 (1911).

39. R. 15.

cause they are made without relation to classification principles.[40] This argument, in summary, appears to be that commodity rates and all-commodity rates are closely akin. Commodity rates *are* classifications *although* they don't resemble the principles of classification. All-commodity rates *are not* classifications *because* they don't resemble the principles of classification.

The District Court has put these considerations in their proper perspective by pointing out that commodity rates and exceptions ratings were developed as departures from the classifications when justified by competition or other particular situations. Indeed, the inability of the principles of classification and of class rates to meet these situations, such as carrier competition, market competition and the transportation characteristics of traffic necessitated these departures in the first place.[41]

The court then noted that all-commodity rates were a natural outgrowth of the rate structure, developed to meet competition and to permit the movement of mixed shipments of freight in carloads. It concluded that, as departures from the classification, the rates in question are no different in principle from similar rates long permitted by the Commission and could find no reason for interpreting § 1(6) so as to prohibit them. Further, it said they violate neither the language nor intent of that section.

The Government, in effect, admits at pages 18 and 28 of its brief that all-commodity rates such as those here in question are not necessarily unlawful. Although it loyally adopts the language of the report that commodity rates are a reasonable category of classification, it is clear that it conceives that all-commodity rates can be lawful when tailored to their legitimate purpose, even if that purpose should be simply competition from a similar rate.

---

40. *Ibid.*

41. See cases cited in note 38, *supra*. See also, Locklin, Economics of Transportation 163 (5th ed. 1960).

Thus, the Commission has nowhere cited any authority nor given any reason for its departure from the *Pacific Coast* case and its interpretation, of twenty years' standing, that all-commodity rates do not violate § 1(6) of the Act. If the Commission, in fact, meant to reverse its prior interpretation of § 1(6) it must fully set forth its reasons for so doing.[42]

The alleged destructive effect of the proposed rates on rate structures is the only apparent reason for the holding that § 1(6) has been violated. If this is to be the attack on the rates it should be made in accordance with the standards of § 15a(3) rather than upon the basis of the principles governing the reasonableness of classifications. Those principles are irrelevant as to non-class rates. Moreover, they could be the instrument by which the purposes of § 15a(3) could be thwarted. Thus, a competing carrier could say that under classification principles the most important element has been value of the article (and, therefore, value of the service); that these articles are of high value and should, therefore, take high rates. If the Commission adopted such an argument it would not appear to be requiring the publishing carrier to protect the traffic or rate structure of the protesting carrier in violation of § 15a (3). It would appear simply to be applying long-established classification principles. So the argument would run. And soon the situation would be back where it was before the enactment of § 15a(3). The Commission would again be the giant handicapper, parcelling out "fair shares" of the traffic and inhibiting the free flow of competitive forces in the name of applying to commodity rates, that which it never applied before, the reasonable classification provision of § 1(6). It has been the recent purpose of Congress to grant greater freedom to regulated carriers in meeting competition.[43] The rulings with respect to intermodal

42. *Secretary of Agriculture v. United States*, 347 U.S. 645 (1954).

43. 72 Stat. 572, 49 U.S.C. § 15a(3) (1958), *I.C.C. v. New York, New Haven & Hartford R. Co.*, 372 U.S. 744 (1963).

competition were greatly clarified by this Court's opinion in *I.C.C. v. N.Y., N.H.&H.R. Co., supra.* It would be extremely unfortunate if the Congressional purpose were now to be nullified by permitting the Commission to impose requirements as to competitive rates which have not been imposed heretofore and which were specifically held not to apply to commodity rates.

B. Reply to the Government's Argument That in Applying § 1(6) the Commission May Appropriately Take Into Account Value of Service Considerations.

With respect to the discussion under this heading, which appears on p. 19 of the Government's brief, it should first be observed that it is, of course, Appellees' position that § 1(6) has no relevancy to commodity rates, such as are here involved. With respect to the applicability of the value of service doctrine in judging the lawfulness of rates under the provisions of the Act which have unquestionable application thereto, Appellees submit the following comments:

First, it should be noted that the lower Court's reference to the value of service matter was not relied upon in concluding that § 1(6) has no application to the rates involved but applies only to classifications used in connection with class rates. The Court simply stated that it would appear that the Commission invoked § 1(6) as a means of preserving a basis for the value of service concept and then followed the comments on value of service to which the Government takes exception.

The value of service concept to which the Court here addressed itself was, as the Court said, that "referred to above . . ." (R. 45), where the Court had listed classification factors, including value of the service, under which ". . . commodities of higher value, whose transportation characteristics were otherwise no different from those of lower value have historically been charged higher rates"

(R. 41). What the Court meant by value of service, therefore, was quite clear. While it is in this sense that the Government uses value of service when it says, for example (on pp. 20 and 21 of its brief), that "Traditionally the value of a transportation service was thought to be a direct function of the value of the commodity to be shipped . . .", it ends up by discussing value in terms of how much a given transportation agency can charge *vis-a-vis* other transportation agencies with which it competes. As to value of service in the sense of effect on the movement of traffic over a given transportation agency, this, of course, is a factor for consideration. But once a carrier has established that there is a reasonable relation between the rate which it has fixed and the competitive factors with which it is attempting to deal, this inquiry should be at an end; the Commission should not be permitted to assume its role as a "giant handicapper" and to undo the Congressional purpose which resulted in the enactment of § 15a(3).

It is respectfully submitted, however, that questions such as these should not be decided in this appeal. The applicability of the value of service principle was not an issue decided by the Commission. The Court ought not to be required to declare principles on this subject in the abstract. It is respectfully submitted that it should hold that § 1(6) of the Act does not apply to commodity rates and that for that reason the Commission's decision was properly set aside, but that there is no need to decide any question concerning value of service as an element of present day rate-making. This was the course followed with respect to a similar question in the *New Haven* case, *supra*, at p. 761.[44]

---

44. Several factual matters in the Government's discussion concerning value of service deserve comment:

1. While the Government says that a railroad cannot justify a reduction of "all its rates" merely by demonstrating that the reduction is competitively required by some, the fact is that the New Haven has by no means reduced all of its rates, not even those between New

II.

REPLY TO THE BRIEF OF APPELLANTS, ALL STATES FREIGHT, INC., ET AL.

Much of what is said in Appellants' brief has already been answered in the foregoing reply to the Government's brief and this will not be repeated here.

A. Reply to Appellants' Contention That the Court Below "Erroneously Reversed Commission for Refusing to Modify Statute."

Under this poin ppellants first argue that the lower court considered § 1(6) significant only in a maximum rate case. More accurately, the Court considered it to be significant only with respect to classifications used in connection with class rates which, with rare exceptions, are the maximum rates applicable in the tariffs. If a class rate actually applies for the transportation of a given article and the classification of that article should be so lowered that the result would be charges below cost, for example, then the classification could be found unreasonable in violation of § 1(6) and raised by the Commission's exercise of its powers under § 15(1). This is the true minimum rate situation, as applied to classification. It was not before the court and the court, of course, did not deal with it.

England points and Chicago and St. Louis, to which the all-commodity rates apply;

2. Senator Wheeler's comments quoted on p. 25 of the Government's brief, would appear to be contrary to the subsequently enacted § 15a(3), as interpreted in *I.C.C. v. N.Y., N.H. & H.R. Co.*, 272 U.S. 761, especially at p. 737;

3. The Hoch-Smith Resolution required an investigation of rates which was held and concluded many years ago. It imposes no further requirements.

4. In the footnote on p. 30 of the Government's brief it is indicated that the New Haven no longer has obstacles to the rendition of a full T.O.F.C. service. This is contrary to the evidence (R. 332-333).

Appellants' contention that the court below reversed the Commission for "refusing to modify" the statute is grounded on the court's statement that the Commission feared that approval of these rates would be legislation on its part, but that having permitted exceptional rates (i.e. rates not subject to the classification, which was built on "classification principles") to the point that all but a small fraction of the traffic now moves on non-class rates, it is "strange to find it boggling at this final step of so little effect on traffic actually moving under class rates". But the court did not say that to approve these rates would constitute legislation, changing the requirement of § 1(6). On the contrary, it referred to what the Commission "now claims" was the original meaning and purpose of § 1(6) but stated that ". . . we do not agree that these rates are or ever were a violation of the language or intent of section 1(6). Commodity rates are sufficiently policed under sections 1(5); 2; 3(1); and 15a(3)" (R. 44).

The following miscellaneous matters appearing under Appellants' argument Point A may be briefly noted:

In the last paragraph on p. 15 of their brief, Appellants say that § 1(6) requires carriers to establish and enforce just and reasonable classifications of property "and further requires that rates for the transportation of property be made with reference to such classifications." It is not correct to say that the statute requires that rates be made with reference to such classification. § 1(6) requires just and reasonable classifications of property with reference to which rates "are or may be made or prescribed . . . ." If rates are made or prescribed with reference to a classification, it must be a reasonable classification. The language of the statute and its plain meaning is thus significantly different from Appellants' paraphrase and from the meaning attributed to the section both by the Appellants and the Government throughout their respective briefs.

Continuing their analysis based upon this erroneous reading of the statute, Appellants say (15-16) that the obvi-

ous significance of the requirement of § 1(6), as they paraphrase it, is that "all rates must bear a reasonable and proper relationship to each other, and the Commission, in the evaluation of any particular rate proposal, not only may but also must consider the impact of that proposal upon the total rate structure of the carriers." To the same effect, the Appellants state on p. 19 that the Commission recognized that the Act "requires differential pricing of transportation to reflect the almost infinite variation between and among the articles and commodities which are transported in interstate commerce." The crushing burden which is thus suggested for the Commission is one which it has never assumed. As it stated in the *Pacific Coast* case, 248 I.C.C. 73, at pp. 86-87, "We have . . . never required commodity rates to conform to the ratings of the classification." Tariff schedules carrying literally thousands of rates are filed with the Commission day in and day out. As to the vast majority of them, no examination whatever is made by the Commission. For example, the Commission's 77th Annual Report (for the year ended June 30, 1963, the latest available) shows that during the year embraced by the report "186,633 publications containing newly established or changed" rates and fares were filed with the Commission (p. 57). But only 1912 rate adjustments were suspended, after which a total of 412 investigation and suspension proceedings were discontinued when carriers cancelled tariffs which they did not attempt to justify and, independent of suspension, only 155 investigation proceedings with respect to the tariffs were instituted (pp. 59, 60 and 63). It would be an entirely false impression, therefore, to believe that the Commission has made it a practice to see to it that all the rates that are used in transporting all varieties of articles are properly classified, one in relation to the other.

It is stated at the bottom of p. 19 of Appellants' brief that if the Commission has the power to require the railroads to transport a given segment of traffic at less than

cost, it must likewise have the power to require the railroads to transport traffic at rates substantially in excess of costs and that that is why § 1(6) makes it the duty of all common carriers to establish reasonable classifications. Whatever power is needed by the Commission to require increases in rates, or to arrest reductions, in proper circumstances, the Commission possesses and has exercised without reference to § 1(6).[45] This power exists by virtue of § 1 in conjunction with § 15a and the minimum rate power given by § 15(1).

The statements on pp. 19 and 20 of Appellants' brief which attribute to the discrimination and undue prejudice requirements of § 2 and § 3 the purpose of giving the Commission the power to require railroads to carry traffic at rates substantially in excess of costs, when the plain purpose of these historic provisions to guard against discrimination is universally known, indicates how extreme is the position to which the Appellants have been driven in this matter.

B. Reply to Appellants' Point B That the Court Below Misinterpreted the Commission's Decision.

Most of what is said under this point in Appellants' brief has been answered in our reply to the Government's brief.

On p. 26 Appellants state that under the holding of the court below the Commission is powerless to regulate transportation rate structures as a whole and to accomplish the goals of regulation embodied in the Act and the National Transportation Policy. The decisions cited in footnote 45 show that this is not true. So also does this Court's decision in the *New Haven* case, *supra*.

---

45. See, e.g., *U.S. v. Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 294 U.S. 499 (1935) and *Youngstown Sheet & Tube Co. v. U.S.*, 295 U.S. 476 (1935).

C. Reply to Appellants' Point C That the Decision Below Rests Upon a Disregard of Facts Found by the Commission.

Appellants' contention here is that the Commission found that under the considered rates the New Haven, in a certain period, transported 4 million pounds more freight "than it would have handled" in the absence of the proposed rates, for additional gross revenue of only $129.00. From this Appellants argue that the "unchallenged findings of the Commission were that the considered all-freight rates will reduce rather than increase the net revenues of the proponent railroads . . . constituting thereby the very type of destructive competitive device which was condemned by the Supreme Court in" the *New Haven* case. As pointed out in the Government's brief, the Commission drew no conclusion of any kind from the figures quoted "not even the conclusion that the rates have resulted in a net loss of revenue during the period of their use" (Government brief, p. 33). Moreover, the truckers' contention completely overlooks the fact that the purpose of the rates was not only to attempt to regain traffic for the New Haven but to prevent further diversion of traffic which it still had at the time the rates were put into effect but which it was in grave danger of losing to its competitors (R. 140).

In connection with this matter it should be noted that the tabulation on p. 10 of Appellants' Brief purporting to show costs and contributions above out-of-pocket costs are computations of Appellants alone; no such findings were made by the Commission.

It may be noted, parenthetically, that in the Government's discussion of the destructive competitive practice point on pages 32 and 33 of its brief it is stated that the Commission's condemnation of the rates rested on the ground that they disregarded classification principles and, as an adjunct to that conclusion, "would undermine the New Haven's rate structure . . .". But the Commission did not identify whether the rate structure was that of the New Haven (a rate structure under which tremendous

amounts of their traffic have been driven to the highways) or the rate structure of the trucks which, under § 15a(3), is not to be the basis for condemning rail rates, *New Automobiles in Interstate Commerce*, 259 I.C.C. 475, 538, and *New Haven* case, *supra*, at p. 757. Moreover, the Commission simply assumed that the rate structure was reasonable. It did not consider and make findings to support this ultimate conclusion. Such findings would have been essential; *Milwaukee* case, *supra* (note 45), at p. 509.

Appellants also contend under their Point C that the rates in question do not present issues under § 15a(3) because "their primary genesis lies in an attempt by the New Haven to meet the trailer-on-flatcar competition of other railroads." The provisions and prohibitions of § 15a(3) apply "In a proceeding involving competition between carriers of different modes of transportation subject to the Act . . . ." This is such a proceeding. The purpose of the rates involved was to curtail diversion of traffic to motor carriers and to recapture traffic lost to them, as well as to compete with T.O.F.C. service of other railroads (R. 140). The alignment of the parties before the Commission was simply motor carriers against railroads. Indeed the Appellants point out on p. 9 of their brief that the railroads having TOFC service competition with the New Haven were parties to the proceedings before the Commission, Plaintiffs in the court below and are Appellees before this Court "in defense of the rates condemned by the Commission."[46]

D. Reply to Appellants' Point D That the Court Below Has Usurped Congressional Prerogatives.

It is argued here that the basis for the court's declaration that the case should not have been decided under § 1(6)

46. These railroads, which published rates competitive with those of the New Haven, could not accept the far-reaching implications of what they regard as the fundamental errors of the Commission's report, particularly its new construction of § 1(6).

is the theory that economic circumstances are different than when § 1(6) was enacted. This is not correct. The court held that § 1(6) never was intended to apply to rates such as those involved, but had application to classifications used in connection with class rates. The same answer may be made to the statement at the bottom of p. 28 of Appellants' brief that it is beyond the authority of the court below to declare that the standards of § 1(6) may be disregarded because a rate proposal does not appear to the court to violate the provisions of §§ 1(5), 2, 3, and 15a(3).

CONCLUSION.

The judgment of the District Court should be affirmed.

Respectfully submitted,

EUGENE E. HUNT,
54 Meadow Street,
New Haven, Conn. 06506,
EDWARD A. KAIER,
1138 Transportation Center,
Philadelphia, Pa. 19104,
Counsel for Appellee-Railroads.

MARGARET P. ALLEN,
JOHN A. DAILY,
ALBERT W. LAISY,
Of Counsel.

October 1, 1964.